BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2020-263-E

Cherokee County Cogeneration Partners, LLC	)	
	)	
Complainant,	)	
	)	
v.	)	**PETITION FOR REHEARING OR RECONSIDERATION**
	)	
Duke Energy Progress, LLC and Duke Energy Carolinas, LLC,	)	
	)	
Respondents.	)	

Cherokee County Cogeneration Partners, LLC ("Cherokee"), pursuant to S.C. Code Ann. 58-27-2150, S.C. Code Ann. Regs. 103-825, and S.C. Code Ann. Regs. 103-854, respectfully moves the Public Service Commission of South Carolina ("Commission") to rehear or reconsider its Order No. 2021-680 issued on October 12, 2021 (the "Order Providing Clarification") in the above-referenced Docket.

I. Background

Addressing the question of "DEC's avoided costs, including energy and capacity components, to which Cherokee is entitled pursuant to PURPA," the Order Providing Clarification (p.8) concluded:

> By way of clarification, however, we direct the parties to DEC and DEP's Late Filed Exhibit No. 1, later Corrected Late Filed Exhibit No. 1, designated as Hearing Exhibit 14, which sets out DEC's avoided cost rate. Hearing Exhibit 14 is based on evidence in the record from DEC which calculated the avoided cost rate in accordance with the provisions of PURPA and applicable law existing at the time Cherokee established its LEO with DEC, pursuant to a ten-year, dispatchable tolling agreement, the form and term of which Cherokee and DEC/DEP agree.

II. Standard of Review

Pursuant to S.C. Code Ann. § 58-27-2150, a party may apply within ten (10) days of

service of the Order Providing Clarification to the Commission for a rehearing in respect to any matter determined in the proceeding. Under S.C. Code Ann. Reg. 103-825(4):

> A Petition for Rehearing or Reconsideration shall set forth clearly and concisely:
>
> (a) The factual and legal issues forming the basis for the petition;
> (b) The alleged error or errors in the Commission order; and
> (c) The statutory provision or other authority upon which the petition is based.

III. Argument

A. The Commission Erred by Failing to Identify the Record Evidence, Ignoring Record Evidence, and by Ignoring Applicable Law Upon Which its Decision was Based

1. The One Page DEC Late-Filed Hearing Exhibit 14 Adopted by the Commission includes an Energy Component that is Unsupported by Record Evidence

After several years of stalled negotiations regarding the appropriate rate to be paid for Cherokee's output, unnecessarily protracted due to DEC's failure to provide supporting data for their rates, six months of discovery and testimony preparation (including numerous filed exhibits) and then a week-long hearing, the Order Providing Clarification accepts in one cursory paragraph DEC rates that were included in a one page exhibit (the Late-Filed Exhibit) filed after the hearing. The rates in the Late-Filed Exhibit were not part of DEC's case in chief, were not included in the record evidence presented by DEC before or during the hearing, and consequently could not have been the subject of questioning during the hearing. The Order Providing Clarification erred in concluding that the "avoided cost rate" set forth for the first time in DEC's Late-Filed Hearing Exhibit 14 and adopted by the Commission "is based on evidence in the record from DEC which calculated the avoided cost rate in accordance with the provisions of PURPA." (Order Providing Clarification, p. 9). To the contrary, there is *no* record evidence to support the energy component of this avoided cost rate.

In DEC's late-filed Hearing Exhibit 14, it revealed for the first time a $34.97 per kW-year avoided energy rate for Cherokee, and the $50.06 per kW-year total rate including capacity for Cherokee, as of October 2018. But these numbers had *never* been presented on the record. This $34.97 per kW-year energy rate in fact was inconsistent with DEC's own energy rate ($43 per kW-year) offered in October 2018 that was used in DEC's case in chief. Duke's witness Freund relied on Cherokee *witness Strunk's* calculation—based on DEC's *own* 2018 offer—for purposes of Mr. Freund's pre-filed testimony. In doing so, Mr. Freund 1) implicitly acknowledged its value as reasonable given his adoption of it for his *own* testimony, and 2) supported a rate virtually identical to the energy rate actually offered by DEC in October 2018--based on DEC's own energy rate data from October 2018 **($43 per kw-year**).[1]

Yet in the Late-Filed exhibit, in purportedly modeling the unit valuing Cherokee's dispatchability for the contract period, DEC produced a new, much lower (**$34.97 per kW-year**) energy rate. See Strunk Testimony, p. 11, Tr. Vol. 1, p. 126.13.[2] *See also* section III-B, below. DEC provided no testimony or documentary evidence alongside late-filed Hearing Exhibit 14 to support or explain the calculation of that avoided energy cost rate, nor did it attempt to explain the illogical result that would in effect suggest that Cherokee is *less* valuable to DEC as an energy resource when modeled as a dispatched unit.

DEC *itself* could not identify any record evidence for its Late-Filed Hearing Exhibit 14

[1] Mr. Freund in his testimony critiqued Mr. Strunk's avoided cost rate calculation and reduced Mr. Strunk's energy rate to remove the start up cost payment of $ 20 per KW-year, resulting $ 43 per KW-year, but noted that start up payments were paid separately under the DEC/Cherokee contract. Tr. Vol. 2, pp. 356-357. [2] Mr. Strunk noted that DEC provided no back up at all to show how DEC calculated its proposed energy rates. Strunk Direct Testimony, p. 11; Tr. Vol. 1, 126.13.

[2] Mr. Strunk noted that DEC provided no back up at all to show how DEC calculated its proposed energy rates. Strunk Direct Testimony, p. 11; Tr. Vol. 1, 126.13.

capacity rate. In that exhibit,[3] and later in its Motion to Strike, DEC struggled to link its new, bald assertions of complex and discretionary modeling to the record evidence:

> So that the numbers presented an apples-to-apples comparison of rates, for the DEC October 2018 entries, the Companies used the avoided cost components for a 10-year dispatchable tolling agreement capacity rate (rather than the 5-year "must-take" structure it originally offered to Cherokee) that they produced to the South Carolina Office of Regulatory Staff ("ORS") in response to ORS Data Request No. 2-2 and that Witness Freund referenced in his live testimony. (Tr. Vol. 2, p. 70.)
>
> *Duke Motion to Strike, p. 3.*

It is striking that DEC does not reference its response to ORS Data Request No. 2-2 by its Hearing Exhibit number: because it does not have one. This data response was barely acknowledged during the hearing, never moved into the record, and thus never subject to review or cross-examination. To this day, DEC has not provided Cherokee sufficient backup that would allow Cherokee to meaningfully assess DEC's avoided energy calculation.

In an attempt to link the newly calculated rates to *something* in the record, DEC incorrectly claimed that Witness Freund referenced the ORS response in his live testimony, citing "Tr. Vol. 2, p. 70." But Mr. Freund never referenced the ORS response. Rather, Mr. Freund's sworn testimony in response to Commissioner Williams' request for the Late-Filed exhibit in hearing was that the 2018 energy component was the "one thing that's missing" (Tr. Vol. 2, p. 385) required to produce the table requested he requested. Mr. Freund testified that *he had not prepared* the Fall 2018 valuation of Cherokee as a dispatchable resource. For that reason, as noted above, his pre-filed testimony relied on Mr. Strunk's $43/kW-year energy valuation (exclusive of start costs).

The citation provided by DEC to the transcript in support of this information being already in the record appears to be a reference to Mr. *Keen*'s live testimony followed by a mistaken citation—there is no page 70 to Transcript Volume 2 as the citation suggests, but Tr. Vol. 2, p. 281 (which

[3] Duke's Late-Filed exhibit only included a double-asterisked note that its DEC Oct 2018 rates were based on its response to ORS data request 2-2.

corresponds to PDF-numbered page 70) briefly references the ORS response comparison a discussion regarding 2018 rates. And although Mr. Keen references the ORS response a single time, he never states or brings into the record the numbers set forth in Late-Filed Hearing Exhibit 14, *i.e.*, the $34.97/kW-year energy valuation of Cherokee, or the $50.06/kW-year total valuation for Cherokee. The Late-Filed Exhibit generates new controversy regarding the avoided energy rate, where beforehand there was none.

2. The Order Providing Clarification Ignored Substantial Record Evidence as to the Appropriate Avoided Energy Cost Rate

As to energy rates, Mr. Strunk testified that he used DEC's *own* peak and off-peak fixed MWh energy rates offered in October 2018 and converted them to annual compensation of **$63 per kW** year.[4] Mr. Freund in his testimony critiqued Mr. Strunk's avoided cost rate calculation and reduced Mr. Strunk's energy rate to remove the start-up cost payment of $ 20 per KW-year, resulting $ 43 per KW-year, noting that start up payments were paid separately under the DEC/Cherokee contract. Tr. Vol. 2, pp. 338.11, 357. Removing the start-up costs from the energy rate resulted in the **$43 per kW-year** rate adopted by Mr. Freund. Tr. Vol. 2, pp. 338.11, 357. Importantly, in neither pre-filed testimony nor during the hearing did DEC contest Cherokee's use of this $43 per kW-year energy component, and indeed adopted it to use for its own calculations. During cross-examination and re-direct, Mr. Freund made no other changes to Mr. Strunk's calculated energy rate other than to reduce it by the start-up costs, as discussed above.[5] Given the substantial record evidence of both Mr. Strunk and Mr. Freund on the

[4] As Mr. Strunk testified, as to his energy rate calculations, he used DEC's own peak and off-peak fixed MWH energy rates offered in October 2018, though DEC did not provide any back up support at that time for the peak and off-peak rates that were offered. He noted that the DEC offered energy rates apparently relied upon the DEC September 2018 standard QF methodology and converted them to annual compensation of **$63 per kW** year. Strunk testimony, p. 16; Tr. Vol. 1, p. 126.18. Removing the start-up costs from the energy rate resulted in the **$43 per kW-year** rate.

[5] Tr. Vol. 2, pp. 355-56, 382.

appropriate energy component of $43 per kW-year, it is the only 2018 avoided cost energy rate that is supported in the record.

3. The Order Providing Clarification Overlooks Record Evidence Supporting the DEC Capacity Rate and Ignores Cherokee's Substantial Evidence as to the Appropriate Avoided Capacity Component

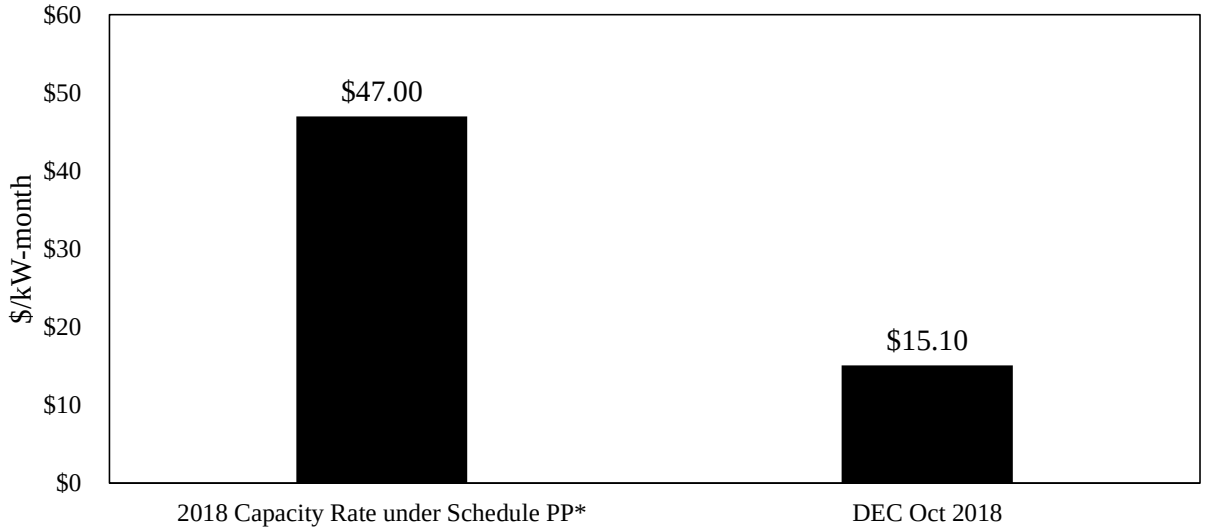
The Order Providing Clarification ignored substantial evidence supporting Mr. Strunk's proposed avoided capacity rate of $47 per kW-year.[6] DEC's October 2018 avoided cost offer provided $0 for capacity payments, as it was based on a 5-year must run supply contract, rather than a ten year dispatchable PPA as sought by Cherokee. The capacity payment of $15 per kW-year in the Late Filed Exhibit was not in DEC's case in chief, and instead resulted from the Commission requiring DEC to revise its October 2018 offer by structuring it as a ten year dispatchable PPA. There is neither substantial evidence supporting DEC's zero capacity payment in the record, as part of its case in chief, nor did Witness Freund offer support for the $15 per kW-year, apparently calculated to incorporate capacity payments for only two years of the 10-year contract.

At the end of the day, DEC's avoided cost for capacity is applied uniformly across their system—DEC either has a capacity need in a given year, or it does not. It is therefore illogical to allow DEC to discount the avoided capacity cost of a much larger QF with greater capacity capabilities compared to Schedule PP QFs. Order No. 2016-349 directed DEC to negotiate avoided cost—it did not permit DEC to unilaterally impose a capacity rate, based on an unfiled

[6] *E.g.*, Strunk Direct Testimony, pp. 4-5; Tr. Vol. 1, pp. 126.6-7. Witness Strunk states that he sourced the capacity value from DEC's Schedule PP tariff to assure non-discrimination. Strunk Direct Testimony, p. 16; Tr. Vol. 1, p. 126.16; Tr. Vol. 3, p. 598.4 ("Duke's October 2018 offer was unreasonable as it did not include compensation for avoided capacity, while DEC was offering avoided capacity cost compensation to other QFs and was itself anticipating adding over 800 megawatts of new capacity during the 2020 to 2026 time frame.") Tr. Vol. 3, p. 594 ("I rely on rates and inputs for avoided capacity that have been approved by this Commission. I do that because the inputs are, by nature, very contentious, and are typically subject to dispute…").

method, that produced a rate *less than a third* of that available to other QFs at the time Cherokee established its LEO. :

Figure 1: 2018 Schedule PP Rate vs. DEC's 2018 Capacity Calculation



*DEC's filed Standard Offer capacity rate available to small QFs at the time Cherokee established its LEO, as applied to Cherokee's production profile.

As discussed above and noted at length by Mr. Strunk, Order No. 2016-349 was controlling precedent in October 2018 when Duke provided its rate schedule, and the rates adopted thereby were 1) based on full capacity compensation for QFs for each year according to the rate schedule, and 2)not discounted to reflect years without a purported capacity need. Tr. Vol. 1, p. 172. Mr. Strunk further testified that when Cherokee established its LEO in September 2018, the Schedule PP Tariff was the only capacity rate for QFs that was approved by the Commission (through Order 2016-349). Strunk Direct testimony, p. 16, Tr. Vol. 1, p. 126.18. He also testified that because the unit value of avoided capacity costs does not change with respect to the size of the QF, it was appropriate to carry over that avoided capacity cost rate from the small QF tariff and apply it to Cherokee. Tr. Vol. 3, p. 602-603, 605-606. The payment of capacity to Schedule PP QFs is itself indicative of a capacity need in any given year (particularly where the particular "peaker" method employed by DEC was inconsistent with applicable law, as

discussed below). As a result, the capacity rate proposed by Mr. Strunk appropriately implements PURPA since it (i) relies on the Commission Order in effect when Cherokee established its LEO and (2) provided compensation for Cherokee's reliable, fully dispatchable capacity that can supplant DEC investment, as intended by PURPA.

4. The Order Providing Clarification Fails to Apply Applicable Law as of the Date of the LEO

a) Failure to Apply South Carolina Law Applicable at the Time of the LEO

The Order Providing Clarification did not apply "applicable law existing at the time Cherokee established its LEO with DEC . . . ." (p. 8). By adopting the Late-Filed Exhibit 14's rates, the Commission applied law made *after* Cherokee established its LEO in 2018. In doing so, the Order on Clarification undercuts the Commission's own conclusion that Cherokee indeed did establish a LEO as of September 2018 and should be paid under the avoided cost methodology in effect at that time, calculated consistent with applicable law at that time.

The Late-Filed Hearing Exhibit is completely divorced from the only "applicable law" in effect at the time of the LEO: Commission Order No. 2016-349. Notably, DEC picked and chose the laws it preferred to justify use of its 2018 IRP forecasts to determine the first year of capacity need—2028—using a method that was never approved by the Commission. Only the year following Cherokee's LEO (once the IRP was subject to scrutiny), the need date was reduced to 2026. In justifying its use of the 2018 IRP at hearing, DEC strained to justify using its 2018 IRP to establish the capacity need date by reference to:

- Order No. 2019-818(A) (issued over one year subsequent to the LEO)[7]

[7] Snider Test. Tr. Vol. 2, p. 390.23 ("The Companies adhered to this first year of need principle based on the 2019 IRPs in developing the avoided cost rates that were filed in the 2019 Avoided Cost Proceeding and approved by the Commission in Order No. 2019-881(A).") While Mr. Snider frequently referred generically to the "peaker methodology," he fails to recognize that the

- A 2017 North Carolina decision that South Carolina never reviewed, applied, or adopted[8]
- A South Carolina decision in a different utility's avoided cost case[9]

DEC's arguments ignore this Commission's role in the rate-setting process. *None* of these references represent the law in effect for DEC as of the date of the LEO: the Commission's Order No. 2016-349. That Order adopted by way of settlement the results of the North Carolina Utility Commission decision that determined DEC's practice of including zeros for years where it forecasted no capacity need was *not* appropriate, as DEC has attempted to do in the Late-Filed Hearing Exhibit No. 14. It is also worth noting that DEC's argument that it should be able to use its calculation method consistent with what it produced for large solar QFs at the same time in 2018 is highly unconvincing. (Tr. Vol. 2, p. 264) First, if DEC violated applicable law as to other entities, that does not justify its actions, nor does it render a corrected result for Cherokee discriminatory. Second, as a practical matter, the economics of an intermittent solar facility do not tend to heavily rely on capacity payments—they generally provide little or no capacity value given their intermittency. It is therefore unsurprising that these other QFs did not push back on

peaker methodology approved with respect to Order 2016-349 did *not* permit DEC to use zeroes for early years of the contract. *See infra*, n. 7.

[8] In Order 2016-349, the Commission approved a settlement whereby the adjudicated outcome from the most recent North Carolina avoided cost proceeding was deemed to be just and reasonable for application in South Carolina. Yet, in adjudicating that outcome in North Carolina, the NCUC had flatly rejected the approach that Mr. Snider presented as DEC's avoided capacity cost methodology. The NCUC held: "It is inappropriate in this docket, when employing the peaker method, to require the inclusion of zeroes for the early years when calculating avoided capacity rates." Order Setting Avoided Cost Input Parameters, North Carolina Utilities Commission Docket No. E-100, Sub 140, December 31, 2014, p. 8. *See* Witness Strunk Rebuttal Cross Examination Tr. Vol. 3, p. 602 ("… at the time [of South Carolina's adoption of the settled rate in 2016-349] the most recent order from the commission had adopted the NCUC approach where the avoided capacity need date really becomes irrelevant, because in that NCUC order, that North Carolina order, the commission had said, "We reject Mr. Snider's approach where he's putting zeros into the early years of the avoided capacity cost levelization formula.").

[9] DEC's counsel suggested that an avoided cost decisions in South Carolina applicable to Dominion under demonstrably different factual circumstances should apply, rather than the decision underlying the effective rate in Order No. Order 2016-349. Tr. Vol. 3, p. 624.

DEC's failure to include capacity payments on a must-take basis. Cherokee, by contrast, was very differently situated than every one of those QFs, is capable of providing capacity far beyond Large solar QFs and even any small QFs that *did* receive capacity payments pursuant to Schedule PP. Differently situated than either of these groups, Cherokee is deeply aggrieved by the failure to properly value Cherokee's capacity.

Order No. 2016-349 is also the only avoided cost order among the South Carolina orders Duke cited that includes *cogeneration* in its directives—applying to *all QFs over 2 MW*, rather than the separate category of "small power producers" that were addressed in the Order No. 2019-881-A rate setting process.[10] While Duke's briefing suggested that Cherokee falls under this Commission's regulatory definition of "Large QF," we note that Cherokee is not a "small power producer" incorporated within the definition of QF; and per Mr. Keen's testimony, Cherokee is actually unique on Duke's South Carolina system as the only fully dispatchable cogeneration QF. See Tr. Vol. 2, p. 303.

It is plainly inappropriate to allow DEC to walk back on the only capacity rate set forth in any Commission order at the time of the LEO—*i.e.*, the capacity rate set forth in Schedule PP employed by Mr. Strunk—and instead rely on a methodology (the particular "peaker" methodology) approved by the Commission in a much later order under much different circumstances. As Cherokee established at hearing, Order No. 2019-818, on which DEC attempts to hang its hat, was adopted concurrently with rules that *also* implemented a robust Commission review process for DEC's IRP development. The 2018 IRP was simply filed with the Commission, did not involve hearings or a review process, and did not even receive a

[10] 18 CFR § 292.101 ("Qualifying Facility means a cogeneration facility *or* a small power production facility that is a qualifying facility"). The Energy Freedom Act, and order No. 2019-881-A implementing, applied to "small power producers," which does not include the category of small power producer. Cherokee does not fit the definition of "small power producer."

Commission Order acknowledging it. (Tr. Vol. 2, p. 454-455). Under its statutory authority, the Commission cannot simply defer to DEC as to such a pivotal driver of avoided capacity costs without first reviewing and vetting the underlying process. Indeed, now that the Commission has undertaken review of the IRPs, it has identified many ways in which it is not compliant with Commission rules and policies.[11]

As Mr. Strunk testified, only in the 2019 avoided cost docket, which was adjudicated after Cherokee's LEO, did the Commission establish a nexus between DEC's IRP and the approved avoided cost calculations. The Duke IRP approval process has been particularly contentious in recent years, as evidenced by the ongoing 2020 IRP approval proceeding where the Commission identified substantive flaws with Duke's more recent IRPs. Tr. Vol. 1, p. 189. At any rate, these events and IRP reviews occurred after Cherokee's 2018 LEO, and were not the "applicable law" at that time.

The Order on Clarification's reliance on the Late Filed Exhibit is also selective when it relies on post-LEO events or determinations. As an example, during his cross-examination, Mr. Freund noted he used a capacity rate of $36 per kW-year for Cherokee by relying on post-2018 information. Freund Cross Examination, Tr. Vol. 2, p. 368-369. That rate supported by Mr. Freund is much higher than the $15 per kW-year rate in the Late Filed exhibit, and much closer to Mr. Strunk's avoided capacity rate calculation of $47 per kW-year.

If the Commission is to use post-2018 information (which it should not), it should not pick and choose, but instead use Mr. Freund's $36 per kW-year rate and adding Mr. Strunk's energy rate of $43 per kW year (without including start-up costs) adopted by Mr. Freund, for an avoided cost rate of $ 79 per kW-year results, much higher than the $50 per kW-year rate

[11] Tr. Vol. 2, pp. 446-49.

apparently resulting from the Order on Clarification's reliance on the Late Filed Exhibit.

b) Failure to Appropriately Construe Order No. 872

The Commission's Order on Clarification concludes by suggesting this case is uniquely impacted by the issuance of FERC's Order No. 872,[12] which revised FERC's PURPA regulations for the first time in decades. However, FERC changed nothing that should impact this case. To the contrary, it affirmed state discretion over PURPA implementation and LEOs specifically, subject to guardrails established by FERC[13]—including 1) to set the avoided cost as of the LEO date on the QFs election,[14] and 2) to take into account the attributes of the resource in setting avoided costs rates (*e.g.*, dispatchability).[15] I Issued well-after Cherokee's LEO was incurred, Order No. 872 *itself* was not applicable law at the time the LEO was incurred. It is unclear upon what portion of Order No. 872 the Commission could have based its decision to apply laws issued in the years *after* a LEO was incurred to calculate avoided costs at the time of the LEO.

IV. In Violation of the Commission's Statutory Obligations, the Order Providing Clarification Erred by Failing to Address Disputed Facts and Reach Conclusions Supported by Substantial Evidence

[12] Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978, Order No. 872, 172 FERC ¶ 61,041 (2020).

[13] South Carolina law recognizes that state implementation must be consistent with FERC's regulations and orders. *See* S.C. Code Ann. § 58-41-20(A) (requiring that Act 62's implementation by the Commission must be "consistent with PURPA and the Federal Energy Regulatory Commission's implementing regulations and orders, and nondiscriminatory to small power producers . . . . "). FERC's regulations in turn require that the avoided cost rates provided to QFs are just and reasonable, in the public interest, and not discriminatory. *See* 16 U.S.C. § 824a-3(c); s*ee also* Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, Order No. 69, FERC Stats. & Regs., 45 Fed. Reg. 12214, 12215 (1980)("Order No. 69").

[14] Avoided cost rates may be based, at the option of the QF, either 1) on avoided costs calculated at the time of delivery or 2) on avoided cost rates projected at the time the obligation is incurred. 18 C.F.R. § 292.304(d)(1)(ii)(A-B).

[15] FERC's regulations implementing PURPA require that state commissions, when determining avoided costs, must take into account factors relevant to this case; (1) availability of capacity or energy as it relates to (a) dispatchability, (b) reliability, and (c) terms, including duration, of any contract or other legally enforceable obligation; and (2) relationship of the available energy or capacity with the ability of the utility to avoid costs. *See* 18 C.F.R. § 292.304(e)(2).

It is important that the Commission take this opportunity to revise the Order Providing Clarification to ensure the Commission satisfies its statutory and regulatory obligations in this proceeding.

While Cherokee did not have the opportunity to mount a full evidentiary challenge to the new "avoided cost rate," because of procedural constraints and because DEC never provided the detailed backup behind it, Cherokee clearly disputed that "avoided cost rate" and provided evidence that the DEC "avoided cost rate" was inappropriate. *See* Cherokee Comments on Duke Late-Filed Exhibit, p. 2 (August 12, 2021). Because those material facts (both the energy component and the appropriate capacity component of the "avoided cost rate" calculated as of October, 2018) were in dispute, the Commission was required to make findings of fact supporting the "avoided cost rate" and its calculation. "Where material facts are in dispute, the administrative body must make specific, express findings of fact." *Able Communications, Inc. v. South Carolina Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151. 152 (1986). Neither the Original Order nor the Order Providing Clarification contains any "specific, express findings of fact" supporting the "avoided cost rate," nor did the initial Commission Order even identify the rate. As explained above, Cherokee attempts to piece together any supporting evidence upon which the Commission could have based its decision to adopt DEC's new, calculation in an effort to address orders' deficiencies. Cherokee uncovered only DEC's failed attempt to link its calculations to record evidence and mistaken applications of laws that were *not* in effect at the time the LEO was incurred, contrary to the Commission's expressed intent.

Instead, the Commission merely concluded that the "avoided cost rate" was appropriate, without reasoning its way to that conclusion with specific findings of fact as required by the S.C. Administrative Procedures Act. "An administrative body must make findings which are

sufficiently detailed to enable this Court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings." *Porter v. SCPSC*, 333 S.C. 12, 21 507 S.E.2d 328, 332 (1998) ("*Porter*"). More particularly, the Order Providing Clarification contains no "findings of fact" supporting its adoption of the "avoided cost rate," and further offers no "explanation of its conclusion." *Id.* ("We find the order in this case deficient because PSC made no findings of fact or offered any explanation of its conclusion.").

By contrast, Cherokee offered substantial evidence, in the form of prefiled and hearing testimony and related calculations, justifying an avoided cost rate for both capacity and energy calculated as of the date of the LEO for a dispatchable agreement with a 10-year term: "the avoided cost rate for this facility shall be the $110 per kW amount, though if start up costs are reimbursed separately, as they are in the 2012 Agreement, the rate would be $90 per kW-year." *See* Cherokee Proposed Order, page 32 and related record testimony and calculations therein at pp. 29-33. Cherokee's avoided cost *calculations* (not just the bare energy and capacity components but how Cherokee witness Mr. Strunk calculated same) were included in Mr. Strunk's prefiled testimony, and were subject to cross-examination from the parties and questions from the Commissioners at the hearing.

As such, Cherokee's proposed avoided cost calculation is the only *calculation* based on record evidence of both an avoided cost capacity and energy rate calculated as of the date of the LEO. Cherokee's s calculated avoided cost rate, including the avoided capacity rate proposed by Mr. Strunk, comports with this Commission's Order No. 2016-349: the avoided cost order approved by this Commission at the time the LEO was created.

Additionally, the avoided energy rate calculated as of the date of the LEO by Mr. Strunk demonstrates the unreliability of DEC's bare "avoided cost rate" numbers. The avoided energy

rate calculated by Mr. Strunk was virtually the same as the avoided energy rates provided by DEC to Cherokee in its October 31, 2018 avoided energy rate schedules. However, Hearing Exhibit 14 presented a much lower energy rate ($9 per kW-year lower than Duke's own October 2018 calculations), that is completely unsupported by any Duke testimony or documentary evidence. There is simply no rational basis for that avoided energy rate calculated by DEC.

Significantly, not only did Duke fail to offer substantial evidence in support of its proposed "avoided cost rate," Duke failed to offer "reliable, probative, and substantial evidence" in opposition to Cherokee's proposed rate. *Porter v. SCPSC*, 332 S.C. 93, 504 S.E.2d 320 (1998). Duke argues that "[t]he Order fails to determine that the avoided cost rates proposed by Cherokee would exceed DEC's avoided cost and not be just and reasonable to customers." (Duke Petition, pp. 11-12). Duke's sole authority for this statement is a graph presented by Mr. Snider and based on calculations by the North Carolina Public Staff in another Docket. That graph shows lower rates than DEC itself has calculated at various times during its negotiations with Cherokee and during this proceeding, is not properly labelled to indicate what costs are included in the "total", and appears to ignore any value for capacity and or a dispatchable PPA. Tr. Vol. 3, pp. 630-633. Therefore, this graph is not reliable evidence, particularly when compared to the reasoned testimony of Mr. Strunk. And of course neither the Order nor the Order Providing Clarification relied on this graph, but included same when summarizing the evidence submitted by the parties and the arguments made by the parties. The Commission erred to the extent that it relied on the aforementioned unreliable evidence.

V. Conclusion

Accordingly, Cherokee requests in light of 1) the procedural and substantive deficiencies associated with Late-Filed Hearing Exhibit 14, and 2) substantial testimony and evidence

introduced by Cherokee in this proceeding, that the Commission reconsider its conclusions in the Order Providing Clarification, and confirm that DEC's avoided costs, including energy and capacity components, calculated as of September 17, 2018 shall be the $110 per kW-year rate as calculated by Cherokee witness Strunk (or $90 per kW-year exclusive of start-up costs). This is the only 2018 10-year dispatchable rate in the record that complies with applicable law as of the date of Cherokee's LEO.

In the alternative, if the Commission rejects the applicable law at the time of the LEO, it should not selectively apply 2019 and later law to 2018 facts incorporated by the Late-Filed Exhibit. Instead, it should be consistent in using post-2018 information, and use Mr. Freund's $36 per kW-year rate that was subject to hearing and cross-examination, adding Mr. Strunk's energy rate of $43 per kW year (excluding start-up costs) adopted by Mr. Freund, for an avoided cost rate of $ 79 per kW-year. Such rate is less than the rate supported by Mr. Strunk based on Cherokee's LEO, but it was set forth in the hearing record and subject to cross examination, respecting Cherokee's due process rights.

Cherokee also requests that the Commission grant such other relief as is just and proper.

[Signature on Next Page]

Respectfully submitted,

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October 22, 2021